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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 358

COPPERWELD STEEL COMPANY, *Plaintiff-Appellant*,

and

THE BALTIMORE & OHIO RAILROAD COMPANY,
Intervenor-Appellant,

v.

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION, *Defendants-Appellees*.

PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL

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Pursuant to Rule 33 of the Rules of this Court, Petitioners Copperweld Steel Company and The Baltimore & Ohio Railroad Company, for themselves and others similarly situated, pray that this Court grant rehearing of its decision filed October 10, 1952, granting the Motion to Dismiss

and dismissing the appeal in the above-entitled case, and that the Court decide that there is probable jurisdiction on appeal to review the final judgment of the United States District Court entered herein on June 24, 1952.

Appellant Copperweld Steel Company presents the following facts, circumstances, and reasons as the basis for its Petition:

1. In the railroad and industrial field the issues decided by the Interstate Commerce Commission in the instant case are of prime importance to most medium-size and large industry, and to many, if not most, of the nation's railroads.

2. The manner in which Division 3 of the Commission, consisting of Commissioners Patterson, Johnson, and Cross, failed to follow the facts as found by the Commission's Examiners, following lengthy hearings, should be of interest to this Court because of the importance of this case as a precedent and the nature of the record upon which the decision is necessarily based.

3. The importance of this decision by the Commission and its affirmance by the Court below is, we believe, that the Commission has gone further in the instant case than in any similar previous case involving the applicable principles heretofore applied by the Commission and in general affirmed by this Court. In so doing, we believe the Commission has gone beyond the limits of the previous decisions of this Court, certainly in the generality of the Commission's basic findings and conclusions and in the procedural methods by which such findings and conclusions were arrived at.

4. We believe that the applicable statutes and the decisions of this Court intend a set of rules under which industry and the railroads may understand and com-

prehend and between them provide workable methods of car delivery and pickup without depriving medium- and large-scale industry of some or all switching services included in the line-haul rate. The latter was done in the instant case. The force and effect of the instant decision is to permit the Commission arbitrarily, as here, to pick out certain industries and plants and say to them "You are not permitted to receive any switching services comparable to those received by the large majority of freight receivers and shippers in the nation." The discrimination in a situation like the instant one is real and the economic cost to this Company is burdensome. This is particularly true in situations, like the Steel Industry, where competition is keen and each penny and dollar of cost is reflected, either adversely or beneficially; and the differentiation of costs between plants and companies engaged in the same competitive field may become fatal.

The state of the law under the Interstate Commerce Commission's decision herein, plus the language of the opinion of the Court below, is one of confusion and utter uncertainty, and affects large numbers of industries and railroads throughout the nation.

The instant decision is the twenty-second decision in this Court on hearing or by consequent affirmance of a lower court's decision, starting with *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, and involving principles and decisions of the Interstate Commerce Commission known as *Ex Parte 104*, 209 I.C.C. 11. We respectfully submit this Court should now clarify the law so that the Interstate Commerce Commission, as well as industry and the railroads, may have better guidance.

It is pointed out that the Briefs in this Court filed by Appellant Copperweld Steel Company and Appellant Baltimore & Ohio Railroad Company in support of jurisdiction

and in opposition to the Motion to Affirm recite specifically the many and detailed errors of the Commission's findings, as opposed to the findings and conclusions of its own examiners. The resulting arbitrary action of Commissioners Patterson, Johnson, and Cross ignores the actual facts and circumstances, to the grave economic detriment of Appellant Copperweld Steel Company.

As hereinafter outlined, important principles are involved which need clarification. If a rehearing is not granted and this decision is allowed to stand, it will become a dangerous precedent since notwithstanding the circumstance that a modern track layout has been conceived, engineered, constructed, and operated after consideration by and with the aid of railroad experts with a view of giving due regard to switching principles announced by the Interstate Commerce Commission, the Commission will henceforth be able to hold

(a) that the mere presence of industry power, notwithstanding absence of any actual interference with railroad power, is an absolute bar to terminal switching;

(b) that the mere fact of weighing on industry scale, notwithstanding the circumstance that such weighing takes place without interruption of movement, is less costly, less productive of delay, and more time saving to the Railroad than if done on the railroad's scale, is an absolute bar to terminal switching;

(c) that the mere circumstance that the same commodity is delivered to more than one location in the plant notwithstanding that such delivery is made in a continuous movement, is an absolute bar to terminal switching; and

(d) that possible delay in connection with the outbound switching *of one commodity*, which constitutes *an*

insignificant portion of the industry's operation, *taints the entire operation*, and bars any and all terminal switching within this plant by the Railroad under the line-haul rate.

It is submitted that this decision of the Commission and the Court below will constitute a dangerous precedent, and the consequences resulting therefrom, particularly on railroad transportation, will be far-reaching, disastrous, and contrary to the policy as envisaged by the National Transportation Act. Therefore, it is submitted that the public interest requires that this Court reconsider its action in granting the mation to affirm and review the Commission's order and the order of the Statutory Court, affirming the same.

Respectfully submitted,

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MAURICE J. MAHONEY
DAVID ROTH
Counsel for Appellants.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

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Attorney for Petitioner